(3)

No. 03-1390

IN THE

Supreme Court of the United States

WASTE RECOVERY ENTERPRISES, LLC.,

Petitioner,

-v-

TOWN OF UNADILLA and TOWN SUPERVISOR
JAMES A. WESTCOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

POINT I

THE SUBSTANTIVE RESULT OF THE SEVERANCE IS TO CAUSE AN UNCONSTITUTIONAL DEPRIVATION OF RIGHTS

Respondents cite to *People v. Liberta*, 645 N.Y. 2d 152 (1984), cert. denied 471 U.S. 1020 (1985). *Liberta* is both instructive and distinguishable from the case in question.

A. *Liberta* involved a statute which defined rape as a crime which could be only committed by a male against a female. Amongst other defenses, the defendant alleged the rape statute violated the "equal protection provision because only men, and not women," could be prosecuted @158.

Rape and other gender based laws arose out of an historical artifact concerning the role and rights of woman. As the court quoted Mr. Justice Holmes in *Liberta* @167 "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." 10 Harv. L Rev 457, 469.

Without reference to any severance provision in the law, the court in *Liberta* found certain provisions of the law unconstitutional as violating equal protection, severed a part of the law, and rewrote the word "male" to read person. Pointing out the horrific consequences of reversing the conviction on equal protection grounds, the court affirmed the conviction because "the defendant is simply not similarly situated to those persons who were not within the scope of the statutes as they existed prior to our decision." @173. See generally "A Norm-Based Remedial Model for Underinclusive Statutes" 95 Yale L. Journal 1185 and specifically fns. 81, 88.

Respondents in their Brief in Opposition in this case treat this Petition as simply a case where the scope of the legislative power to sever is the question before the court. But that is really not the question. The question could better be framed: Even if the legislative body would have liked the court to sever the exception and broaden the scope of the criminal law, substantively can the courts allow that to happen.

Should a legislative body be allowed to allow, and should a court be allowed to, with or without legislative authorization, sever an exception to a criminal law such that as a result of the court's action, the criminal law becomes broader, rather than narrower, without public notice, public comment and an action by the legislative body that puts the public, the target of the law, on notice that if they take the prescribed action, they are committing a crime for which they could be imprisoned for a substantial period of time.

In *Bouie v. City of Columbia*, 378 US 347, the State Supreme Court broadened its interpretation of a criminal law:

> The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction. . . @ 352

That is precisely the situation created by the court's severance of the exception in this case.

Perhaps because of the difficulty of prosecuting a female for rape when females are not named as potential defendants in the statute, the State of New York amended the law in question the

year following this Court's denial of cert (Ch 810 laws of 1987) to make the statute gender neutral.

B. The present case involves not an historic artifact based upon sex discrimination and equal protection, but a violation of the Commerce Clause of the Constitution Art. I, § 8, clause 3 the provision that led the early American government to draft and adopt the Constitution as a successor to the Articles of Confederation. Unlike a sex based equal protection argument, the State Courts' decisions have the result of sanctioning the last remnant of three local laws all of which violated the Commerce Clause as written and two of which have already been struck down by the NY Courts in their entirety. Waste Recovery Enterprises would also be subject to the law as rewritten by the courts. In those circumstances, regardless of a severance provision likely added to the cookie cutter law with little thought, the law should be struck in its entirety and not salvaged in a way which makes this criminal law broader rather than narrower.

CONCLUSION

Certiorari should be granted, and the Order of the state Courts modified to find the law unconstitutional in its entirety.

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